

A **CHUAH KOK HUA v. CHUAH KOK HOE & ANOTHER CASE**

HIGH COURT MALAYA, PULAU PINANG

WONG TECK MENG JC

[CIVIL SUIT NO: 22NCVC-657-09-2012 &
B ORIGINATING SUMMONS NO: 24-1683-10-2012]

4 DECEMBER 2015

C **SUCCESSION:** *Will – Executor’s power of sale under will – Sale of property – Terms in will – Whether interpreted in accordance with wishes of deceased – Option to purchase – Whether plaintiff as beneficiary of will had right to purchase property – Whether plaintiff failed to settle earnest sum within time – Whether plaintiff entitled to insist executor to transfer share of property into plaintiff’s name – Whether contravened s. 60(3) Probate and Administration Act 1959 – Whether executor had full and absolute discretion to sell property without consent of other beneficiaries*

D The defendant was the sole executor and one of the seven beneficiaries of the estate of his mother, Tan Gaik Ee (‘the deceased’). The plaintiff and the defendant were brothers and he was also one of the seven beneficiaries of the estate. The deceased died testate by leaving a will (‘the will’) dated 29 November 2007. In the deceased’s will, one of the properties (‘the first property’) was bequeathed to the seven beneficiaries, including the plaintiff and the defendant, in equal shares absolutely. The facts revealed that the plaintiff’s children were owners of a company and operated their business at the first property. The said company was also a tenant of the first property. Pursuant to cl. 5 read together with cl. 7(A)(b)(i) of the will, the defendant was empowered as the absolute owner of the first property and had absolute discretion to sell the first property for the benefit of the beneficiaries. Further, the will stipulated, *inter alia*, that the deceased intended to give, devise and bequeath all her registered undivided share and interest in the first property to her granddaughter and six sons in equal shares absolutely. After obtaining the grant of probate, majority of the beneficiaries of the estate intended to sell the first property, except for the plaintiff and another beneficiary. On 6 July 2012, the defendant received a letter from one Teoh Eow Beng expressing his interest to purchase the first property with an offer of RM3,850,000. However, the plaintiff also expressed his intention to exercise his rights to purchase the first property. *Vide* a letter dated 24 July 2012, the defendant gave the plaintiff the first option to purchase the said property for the sum of RM3,850,000 by giving him a notice period of seven days from the date of receipt of the said letter to pay 1% of the sale price as earnest money. Due to the plaintiff’s failure to make the said payment, the option to purchase was given to Teoh Eow Beng and the latter duly settled the earnest money to purchase the first property. Dissatisfied, the plaintiff objected to the sale and hence, filed suit no. 22NCVC-657-09-2012 (‘suit 657’). The defendant, as well, filed suit no. 24-1638-10-2012

(‘suit 1638’) for an order for sale of the first property to Teow Eow Beng. It was argued, *inter alia*, that (i) the plaintiff was entitled to his share of the first property as provided under the will; (ii) the intention of the deceased was to give 1/7 shares of the first property to the beneficiaries and in the event the first property were to be sold, it shall be first offered to the beneficiaries; (iii) the defendant had to obtain the approval of all the beneficiaries before he could sell the first property; and (iv) the plaintiff’s share was to be transferred and registered under his name. The plaintiff filed an application under O. 33 r. 2 and/or r. 5 of the Rules of Court 2012 and the issues that arose for consideration were (a) whether the plaintiff was entitled to insist the executor to transfer 1/7th share of the first property into the plaintiff’s name (‘first issue’); and/or (b) whether the executor had full and absolute discretion to sell the property under the will without the consent of all the beneficiaries (‘second issue’).

Held (dismissing plaintiff’s claim in suit 657; allowing defendant’s claim in suit 1683):

- (1) The will was executed with a clear intention of the testament that prior to the sale of the first property, it shall be let out. Hence, any transfer of shares of the first property into the plaintiff’s name would defeat the wishes and testament of the deceased. Further, cl. 7(A)(b)(i) of the will relates to the position of a sale and not transfer of the first property which again reinforces that the deceased’s intention was clear, *ie*, that the first property can be sold and not transferred to the respective beneficiaries first. Therefore, any attempt to force a transfer of the first property to the respective beneficiaries could be construed as an attempt to circumvent the clear and express wishes of the testator, where in the event the first property were to be sold. (para 42)
- (2) The executor was empowered as the absolute owner of the first property and had the absolute discretion to sell the first property on the condition that it was for the benefit of the beneficiaries. The facts and circumstances of the intended sale of the first property showed that the executor had complied with the wishes of the majority of the beneficiaries who wished to sell of the property and that the property was offered at the prevailing market price of RM3,850,000 *via* a valuation report. Hence, the executor had acted for the benefit of the beneficiaries. The executor had fulfilled all the conditions imposed in the will and hence, had the right to exercise his power under the will to sell the first property to Teoh Eow Beng for RM3,850,000 (*Ong Thye Peng v. Loo Choo Teng & Ors*; *refd*). (paras 43 & 44)
- (3) The plaintiff’s demand for the transfer or registration of 1/7th of the shares of the first property into his name would contravene the operation of s. 60(3) of the Probate and Administration Act 1959 (‘PAA’) since the executor would no longer have the power to sell the first property in any manner the executor may think proper subject to the imposition of any

- A restriction by the will of the deceased. Hence, the plaintiff's approach, if adopted, would render s. 60(3) meaningless. The plaintiff had no right to demand the executor to transfer the said shares of the first property into his name and in the interest of justice, the wishes of the majority of the beneficiaries for the sale of the first property had to be upheld for the benefit of the estate as a whole. (paras 47 & 48)
- B
- (4) *Vide* s. 60(3) of the PAA, the defendant as the executor had the power to dispose of all or any property vested in him as he may think proper, subject to any restriction which may be imposed on his behalf by the will of the deceased. Hence, the defendant had the power to dispose of the first property without any order of the court under s. 60(3) of the PAA. There was no condition imposed in the will to mandate the transfer of the shares of the beneficiaries into their names first before the executor could dispose it by a sale. In the circumstances, the defendant had the power to sell the first property without the consent of all the beneficiaries. (paras 51, 54 & 58)
- C
- D
- (5) The wishes of the majority of the beneficiaries here was to sell the first property at the best price at the prevailing market rate of RM3,850,000 to Teow Eow Beng. The ulterior motive of the plaintiff was to prevent the sale of the first property by the defendant so that the plaintiff and his children could continue to run their hardware business at the premise which had been rented out to their company. The interference by the plaintiff was to deprive the other beneficiaries to the benefit of their inheritance that was their 1/7 shares each of the first property. (para 58)
- E
- (6) The defendant had given the first option to purchase the first property to all the beneficiaries including the plaintiff and since none of the beneficiaries wished to purchase the first property at RM3,850,000, the executor had fulfilled all the conditions imposed in the will and as a result, the executor had the right to exercise his power under the will to sell the first property to Teoh Eow Beng. Up to the current date, the plaintiff did not produce any valuation report to show that the market price should be higher than RM3,850,000 and as such, the said price was the highest price available. Any lower price quoted by the plaintiff was unacceptable and not in the best interest of the estate. In the circumstances, the order for sale of the first property applied for by the defendant was granted. The defendant had procured the best market price for the first property and there was no evidence of *mala fides* on his part. The first issue was answered in the negative and the second issue was answered in the positive. (paras 60, 62, 65 & 66)
- F
- G
- H

Case(s) referred to:

- I *Ayer Itam Height Sdn Bhd & Ors v. Chung Nyuk Sen* [2003] 2 CLJ 685 CA (*refd*)
Khoo Cheng Ors v. Gan Hong Yock & Ors And Another Appeal [2005] 2 CLJ 85 CA (*refd*)
Khoo Cheong Puay v. The Oversea Chinese Banking Corporation Ltd & Ors [1935] 1 LNS 26 HC (*refd*)

Lau Yoke Hee & Anor v. Ting Liang Teng & Anor [2005] 3 CLJ 770 CA (*refd*) A
Lee Ah Ngan & Satu lagi lwn. Lee Kow [1995] 2 CLJ 51 HC (*refd*)
Ligar Fernandez v. Eric Claude Cooke [2002] 6 CLJ 152 HC (*refd*)
Ong Ah Tang & Anor v. Soh Bee Yong [2013] 1 CLJ 224 CA (*refd*)
Ong Thye Peng v. Loo Choo Teng & Ors [2008] 1 CLJ 571 FC (*refd*)
SI Rajah & Anor v. Dato Mak Hon Kam & Ors (No. 1) [1994] 1 CLJ 207 HC (*refd*) B
Tan Hock Khoon v. Phua Siew Leung & Ors [2006] 4 CLJ 423 CA (*refd*)
Yap Yoke Luan & Ors v. Ong Wee Tok & Ors [1983] 2 CLJ 252; [1983] CLJ (Rep) 433
 FC (*refd*)

Legislation referred to:

Probate and Administration Act 1959, s. 60(3)
 Rules of Court 2012, O. 33 rr. 2, 5 C

Other source(s) referred to:

G Raman, *Probate and Administration in Singapore and Malaysia*, 2nd edn, p 128
Halsbury's Law Of Malaysia, 2011 Reissue, vol 11(2), Powers of Attorney, Wills,
 Probate, Administration and Succession, p 494, para 330.540
The Law of Succession Testate and Intestate, 6th edn, p 255 D

For the plaintiff - Alfred Lai Choong Woi; M/s Gideon Tan Razali Zaini
For the defendant - Edmund Anthony Hermon; M/s Quah & Yeap

Reported by Kumitha Abd Majid

JUDGMENT E

Wong Teck Meng JC:

Introduction

[1] In Suit No. 22 NCVC-657-09-2012, the plaintiff (Chuah Kok Hua) is F
 claiming against the defendant (Chuah Kok Hoe) for these principal reliefs:

- (i) that he is to specifically perform this obligation under the will and
 cause the plaintiff's 1/7 share to the first property be registered in Grant
 No. 11979 to the first property; and
- (ii) further and/or in the alternative, a declaration that the defendant can G
 only sell the first property with the unanimous written consent of all
 beneficiaries under the will.

[2] In Originating Summon No. 24-1683-10-2012, the plaintiff is Chuah H
 Kok Hoe whereas the defendant is Chuah Kok Hua. The plaintiff as the sole
 executor seeks an order from the High Court for an order for sale of the same
 first property to Teow Eow Beng, Chuah Ah Pheow, Ch'ng Teik Huat, Tan
 Gim Hai, Teoh Eow Beng, Yong Thai Yen, Lim Khai Meng and Ooi Li
 Kheng or company owned by Teow Eow Beng for RM3,850,000 and if the
 transfer or sale to the said parties fails or unsuccessful for any reason I
 whatsoever, then the defendant as the executor be given the approval to sell
 the first property to any other party at the highest price at the material time.

- A [3] On 26 April 2013, the High Court made an order that the Originating Summon No 24-1683-10-2012 be heard and disposed off together with 22NCVC-657-09-2012 in the same High Court.

Facts Of The Case

- B [4] The facts of the case are taken into totality by referring to all the affidavits filed in respect of both proceedings. With respect, I have also adopted part of the defendant's counsel's well written summary of the facts of this case.

- C [5] The defendant is the sole executor and one of the seven beneficiaries to the estate of Tan Gaik Ee, the deceased, whom had passed away on 12 August 2011.

[6] The plaintiff is one of the seven beneficiaries to the estate of Tan Gaik Ee. The plaintiff and the defendant are brothers and the deceased was their late mother.

- D [7] The deceased died testate leaving a will dated 29 November 2007.

[8] The defendant had obtained a grant of probate *via* Penang High Court Petition No. 32-545-2011 for the administration of estate of deceased.

- E [9] In the deceased's will, one of the properties of the deceased's estate ie, all the undivided shares of a piece of land held under Grant No. Pendaftaran 11979, No. Lot 2584 and Geran No. Pendaftaran 11980, No. Lot 2590 both of Seksyen 5, Daerah Timur Laut, Bandar Ayer Itam, Pulau Pinang together with the premises erected thereon and bearing assessment address No. 28-N, Mukim 13, Ayer Itam, 11500 Penang (hereinafter referred to as "the first property") is bequeathed to the defendant plaintiff Chuah Kok Pheng, Chuah Lee Fong, Chuah Kok Beng, Chuah Kok Huat and Chuah Kok Chai (hereinafter referred to as "the said beneficiaries of the first property") in equal shares absolutely.

- G [10] Clause 7(A)(b)(i) of the will provides:

in the event that the First Property were to be sold, then it shall firstly be offered to be purchased at the prevailing market value then by any one or more of my aforesaid granddaughter and six (6) sons; and ...

- H [11] Pursuant to cl. 7(A)(b)(ii) of the will, the first property shall be let out before the sale of the first property. The clause provides as follows:

prior to the sale of the First Property as aforesaid, it shall be let out at a valuable consideration subject again to it be offered to be taken up by any one or more of the my aforesaid granddaughter and six (6) sons at the prevailing market rent then, the proceeds thereof shall be given to all my aforesaid granddaughter and six (6) sons in equal share absolutely.

I

[12] Pursuant to cl. 5 read together with cl. 7(A)(b)(i) of the deceased's will, the defendant as the executor to the estate of the deceased is empowered as if he is the absolute owner of the said first property with all the accompanying powers given therein. A

[13] Clause 5 of the will provides:

The Executor is empowered to do all acts, initiate all proceedings as well as exercise all rights and privileges in relation to any property of my estate as though the Executor were the absolute owner of such and further to make, execute and deliver any instruments and/or enter into any covenants or agreements binding my estate or any portion thereof for the benefit of the beneficiary/ies of and in accordance with this will of mine. B
C

[14] After obtaining the grant of probate, the defendant together with Chuah Lee Fong, Chuah Kok Beng and Chuah Kok Huat (4 out of the 7 beneficiaries) whom are the majority of the said beneficiaries of the first property intend to sell the said first property. Only the plaintiff and Chuah Kok Pheng (the defendants in Originating Summons No. 24-1683-10-2012) did not wish to sell the said first property whereas Chuah Kok Chai did not object to proposed sale of the said first property. D

[15] In or about July 2012, the defendant had received a letter dated 6 July 2012 from Teoh Eow Beng wherein he had expressed his interest to purchase the said first property through himself or a company as nominated by himself with an offer of RM3,850,000. E

[16] By a letter dated 11 September 2012 from Teoh Eow Beng's solicitors, Messrs Teow Saw & Associates, he had informed the defendant's solicitors, Messrs Quah & Yeap about the intended shareholdings of ownership in his offer to purchase ie, Chuah Ah Pheow (20%), Ch'ng Teik Huat (40%). Tan Gim Hai (5%), Teoh Eow Beng (10%), Yong Thai Yen (15%), Lim Khai Meng (5%) and Ooi Li Kheng (5%). F

[17] By a letter dated 12 July 2012, the defendant as the executor had directed his solicitors, Messrs Quah & Yeap to write to all the said beneficiaries of the said first property except the defendant himself to inform them of the said offer to purchase by Teoh Eow Beng and had given them the first option to purchase the said first property in accordance with cl. 7(A)(b)(i) of the deceased's will. G

[18] The defendant in his capacity as a beneficiary together with Chuah Lee Fong, Chuah Kok Beng and Chuah Kok Huat had released their right to the first option to purchase the first property at the sum of RM3,850,000 through their letters dated 23 July 2012 respectively. H

[19] Chuah Kok Pheng and Chuah Kok Chai on the other hand had not responded to the defendant's solicitors' letter dated 12 July 2012. I

A [20] By a letter dated 20 July 2012, the plaintiff had expressed his intention to exercise his right to purchase the first property.

B [21] By a further letter dated 24 July 2012, the defendant as the executor had given the plaintiff the first option to purchase the first property for the sum of RM3,850,000 by giving him a notice period of seven working days from the date of receipt of the said letter to make payment of earnest money of 1% ie, RM38,500.

C [22] By two letters from the plaintiff to the defendant's solicitors dated 25 July 2012 and 27 July 2012, the plaintiff had requested a copy of the valuation report of KT Appraisers from the defendant.

D [23] The defendant's solicitors by a letter dated 31 July 2012 had attached together a copy of the valuation report dated 23 July 2012 to the plaintiff and had given the plaintiff the option to purchase the first property again by giving him a notice period of seven working days from the date of receipt of the said letter to make payment of earnest money of 1% ie, RM38,500.

E [24] By a letter dated 8 August 2012 from the plaintiff to the defendant's solicitors, the plaintiff had seek a period of seven days from the date of receipt of the said letter to revert back with his decision pending the valuation report from his appointed land valuer.

F [25] Till to date, the plaintiff had yet to make any payment towards the purchase of the first property.

F [26] Messrs Saw & Associates, solicitors for Teoh Eow Beng by a letter dated 13 August 2012 had issued a Maybank cheque number 120431 for the sum of RM38,500 as the earnest money to purchase the first property.

F [27] The plaintiff objected to sale of the first property to Teoh Eow Beng for the sum of RM3,850,000 and hence has filed the present suit.

G [28] The children of the Plaintiff are the owners of a company, CH Choon Heng Hardware Sdn Bhd which is operating business at the first property. The said company is also the tenant of the said first property. The plaintiff contends that the family business has been operating at the premise for about 40 years and be allowed to continue to be there without any interference.

The Application (22 NCVC-657-09-2012)

H [29] The plaintiff filed a notice of application dated 19 January 2015 pursuant to O. 33 r. 2 and/or r. 5 of the Rules of Court 2012 and/or the inherent jurisdiction of this court for the following orders:

- I (i) that this Honourable Court determines and disposes of the suit herein based on the following issues of fact and/or law:
- (a) whether pursuant to the terms of the will dated 29 November 2007, the plaintiff is entitled to insist that the executor transfers the 1/7 share to the plaintiffs' name; and/or

- (b) whether the executor has full and absolute discretion to sell the property at Lot No. 2584 Geran Pendaftaran No. 11979, Bandar Air Hitam, Timur Laut bearing postal address at No. 28N, Mukim 3, Ayer Itam, 11500, Penang under the will without the consent of all the beneficiaries. A
- (ii) such further directions and/or order to be given by this Honourable Court as to the manner of determination of the above preliminary issues and the disposal of the case pursuant to O. 33 r. 2 and/or r. 5 of the Rules of Court 2012 and for parties to be heard thereon; B
- [30]** Order 33 r. 2 of the Rules of Court 2012 provides as follows: C
- Time of trial of questions or issues
2. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. D
- [31]** The court may resolve an issue as a preliminary issue or point of law or fact which is likely to have the effect of substantially disposing of the cause or matter without proceeding to trial as provided by O. 33 r. 2 of the Rules of Court 2012. E
- [32]** In *Ayer Itam Height Sdn Bhd & Ors v. Chung Nyuk Sen* [2003] 2 CLJ 685, the Court of Appeal had [1] “As was said in *Everett v. Ribbands*, “where there is a point of law which, if decided in one way, is going to be decisive of the litigation, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of pleadings or shortly afterwards”. F
- [33]** The very essence that the court orders a preliminary issue or point of law to be tried is the substantial saving of time and expenditure. See *SI Rajah & Anor v. Dato Mak Hon Kam & Ors (No. 1)* [1994] 1 CLJ 207, where the High Court observed that as a general rule the court will exercise its power under O. 33 r. 2 if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole. G
- [34]** Once the court determined the issue, O. 33 r. 5 empowers the court to dispose of the cause or matter in which O. 33 r. 5 provides: H
- Dismissal of action after decision of preliminary issue.
5. If it appears to the court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just. I

- A [35] Both parties in this proceeding, want this court to determine and dispose this suit based on the two preliminary issues/points of law to be tried as it would substantially dispose of the cause or matter or renders the trial of the cause or matter unnecessary.

Issues To Be Determined

- B (1) *Whether Pursuant To The Terms Of The Will Dated 29 November 2007, The Plaintiff Is Entitled To Insist That The Executor Transfers The 1/7 Share To The Plaintiff's Name*

- C [36] The main contention of the plaintiff on this issue is that the defendant as the sole executor of the will who's duties is to call in the estate's assets, determining the beneficiaries and the shares the beneficiaries are entitled to and thereafter distributing the assets. Plaintiff's counsel referred to the textbook on *Probate and Administration in Singapore and Malaysia* (G Raman) 2nd edn. at p. 128 as follows:

- D the duties of personal representative revolve around the tasks of calling in the estate's assets, determining the beneficiaries and the shares they are entitled to and thereafter distributing the assets.

- E [37] The case of *Ligar Fernandez v. Eric Claude Cooke* [2002] 6 CLJ 152 was also quoted by plaintiff's counsel to support plaintiff's contention that the executor should transfer the 1/7 share of the first property into his name p. 156, the above stated case held that:

The principal duties of an executor are to get in the assets of the deceased to pay his debts, to pay the legacies given in the will and to distribute the assets. The duties of the Executor are set out in s. 68 of the Probate and Administration Act 1959.

- F [38] Therefore, according to the plaintiff's counsel, the executor is required to administer and distribute all the assets according to the intention of the deceased as expressed in the will which is clearly spelt out under cl. 7 sub-cl. (A) of the will where the intention of the deceased was that the decided to give, devise and bequeath all her registered undivided share and interest in the first property to her granddaughter and her six sons in equal share absolutely. The plaintiff's counsel therefore submits that the defendant who is the sole executor of the will must execute the will according to the intention of the deceased and caused the plaintiff's 1/7 shares to the first property to be registered in Grant No. 11979.

- H [39] With respect to the plaintiff's submission, I agree that the plaintiff is entitled to 1/7 share of the first property as provided under the will but the issue here is whether it is the intention of the deceased that the 1/7 share be transferred and registered in Grant No. 11979 in the plaintiff's name.

- I [40] In determining this issue, I will scrutinise the terms in the will and confine my interpretation of the intention of the deceased within the four corners of the will.

[41] In the will, there are conditions stipulated in cl. 7(A)(b)(i) and (ii) which are reproduced as follows: A

b. Conditions

- i. in the event that the First Property were to be sold, then it shall firstly be offered to be purchased at the prevailing market value then buy any one or more of my aforesaid granddaughter and six (6) sons; and B
- ii. prior to the sale of the First Property as aforesaid, it shall be let out at a valuable consideration subject again to it be offered to be taken up by any one or more of my aforesaid granddaughter and six (6) sons at the prevailing market sent then the proceeds thereof shall be given to all my aforesaid granddaughter and six (6) sons in equal shares absolutely. C

[42] By considering the two conditions stipulated in the will, it is my considered view that the will was executed with a clear intention of the testament that prior to the sale of the first property, it shall be let out. Hence, any transfer of shares of the first property into the plaintiff's name would defeat the wishes and testament of the deceased. Furthermore, cl. 7(A)(b)(i) relates to the position of a sale and not transfer of the first property which again reinforces that the deceased's intention was clear that the first property can be sold not transferred to the respective beneficiaries first. Therefore, any attempt to force a transfer of the first property to the respective beneficiaries can be construed as an attempt to circumvent the clear and express wishes of the testator, where in the event that the first property were to be sold. Furthermore, there is no additional condition in the will requiring the 1/7 shares of the beneficiaries be transferred into the first property before it could be sold. D
E
F

[43] In addition, the executor is given the power to sell the first property as its absolute owner by reading cl. 5 and cl. 7(A)(b)(i) of the will together. Clause 5 of the will reads:

The Executor is empowered to do all acts, initiate all proceedings as well as exercise all sights and privileges in relation to any property or my estate as though. The Executor were the absolute owner of such and further to make, execute and deliver any instruments and/or enter into any covenants or agreements binding my estate or any portion thereof for the benefit of the beneficiary/ies of and accordance with this will of mine. G
H

[44] In the instant case, the executor having being empowered as the absolute owner of the first property has the absolute discretion to sell the first property on the condition for the benefit of the beneficiaries. From the facts and circumstances of the intended sale of the first property, the executor had complied with the wishes of the majority of the beneficiaries who wished to sell of the property and that the property was offered at the prevailing market price of RM3,850,000 *via* a valuation report by KT Appraisers. Hence, the I

- A executor had acted for the benefit of the beneficiaries. The executor had also complied with cl. 7(A)(b)(i) of the will by giving the first option to purchase to all the beneficiaries including the plaintiff and since none of the beneficiaries wishes to purchase the first property at RM3,850,000. Certainly, the executor had fulfilled all the conditions imposed in the will and hence has the right to exercise his power under the will to sell the first property to Teoh Eow Beng for RM3,850,000.

[45] In *Ong Thye Peng v. Loo Choo Teng & Ors* [2008] 1 CLJ 571, the Federal Court held that:

- C As they act in the interest of all beneficiaries their duty is to ensure that the estate of which they are trustees benefits as much as possible when they deal with the trust property.

[46] In *Ong Ah Tang & Anor v. Soh Bee Yong* [2013] 1 CLJ 224; [2012] 2 MLRA 762, the Court of Appeal held that:

- D In the instant appeal, the High Court ordered the lands to be sold to the respondent contrary to the relief sought by the appellants and against the wishes of the majority of the beneficiaries who supported the application that the lands to sold by public auction ... In the circumstance of the case, such an order is legally unsustainable.

- E [47] There is another reason for not allowing the plaintiff to demand for the transfer or registration of 1/7 shares of the first property into his name. The reason is that the plaintiff's demand would contravene the operation of s. 60(3) of the Probate and Administration Act 1959 as the executor will no longer have the power to sell the first property in any manner the executor may think proper subject to the imposition of any restriction by the will of the deceased. Hence, the plaintiff's approach if adopted would render s. 60(3) of the Act meaningless. For clarity, s. 60(3) of the Probate and Administration Act 1959 is reproduced here as follows:

- G A personal representative may charge, mortgage or otherwise dispose of all or any property vested in him, as he may think proper, subject to any restriction which may be imposed in this behalf by the will of the deceased, and subject to this section;

Provided that an executor may dispose of any property notwithstanding any restriction to imposed, if he does to in accordance with an order of the Court.

- H [48] Based on my above reasoning, my decision on this issue is that the plaintiff has no right to demand the executor to transfer 1/7 shares of the first property into his name and in the interest of justice, the wishes of the majority of the beneficiaries for the sale of the first property has to be upheld for the benefit of the estate as a whole.

I

(2) *Whether The Executor Has Full And Absolute Discretion To Sell The Property At Lot No. 2584 Geran Pendaftaran No. 11979, Bandar Air Hitam, Timur Laut Bearing Postal Address At No. 28N, Mukim 13, Ayer Itam, 11500 Penang Under The Will Without The Consent Of All The Beneficiaries* A

[49] The plaintiff contends that from cl. 7(A) of the will, the intention of the deceased was very clear which is first to give 1/7 shares of the first property to the seven beneficiaries and in the event the first property were to be sold, it shall be firstly offered to the beneficiaries. The plaintiff's counsel submits that the defendant's contention that he has the absolute power to sell off the first property without obtaining the unanimous consent of all the beneficiaries was clearly wrong because the defendant has no right or whatsoever to sell of the share belonging to the plaintiff on the first property. B C

[50] On the other hand, the defendant's contention is that the defendant as the executor has the power to sell the first property in any manner the executor may think proper subject to the imposition of any restriction by the will. D

[51] I have to reiterate that under s. 60(3) of the Probate and Administration Act 1959, the defendant as executor has the power to dispose of all or any property vested in him, as he may think proper, subject to any restriction which may be imposed in this behalf by the will of the deceased.

[52] The scope of s. 60(3) of the Act has been laid down by the Federal Court in *Ong Thye Peng v. Loo Choo Teng & Ors* [2008] 1 CLJ 571, at p. 600 as follows: E

[21] In our opinion the language employed in s. 60 of the 1959 Act is clear. It is concerned with the manner of disposal of the property of a deceased person by his personal representative. Section 60 (3) of the 1959 Act deals with the disposal of the property of a person who dies testate while s. 60(4) of the 1959 Act deals with the property of a person who dies intestate. Under s. 60(4)(a) of the 1959 Act the immovable property of a person who dies intestate may not be disposed of without the previous permission of the court. Under s. 60(3) of the 1959 Act the property of a person who dies testate may be disposed of in any manner the executor may think proper subject to the imposition of any restriction by the will of the deceased. F G

[53] In *Khoo Cheong Puay v. The Oversea Chinese Banking Corporation Ltd & Ors* [1935] 1 LNS 26; [1935] 1 MLRH 640 where it was held that on the true construction of the deceased's will, there was no restriction on the executor's power of sale over the immovable property of the estate, hence, the executors could sell without an order of the court. H

[54] Hence, the defendant as the executor has the power to dispose off the first property without an order of the court under s. 60(3) of the Probate and Administration Act 1959. Upon reading the said will, there is no condition imposed in the will to mandate the transfer of the 1/7 shares of the I

- A beneficiaries into their names first before the executor can dispose it by a sale. As I see it, the defendant is attempting to impose his own words into the will which is against the intention of the testator. Furthermore, if the contention is followed suit by the executor, the power of the executor to dispose of the said property would become academic once the names of the
- B beneficiaries have been transferred and registered in the land title of the first property. This would clearly defeat the wishes and testament of the deceased under cl. 7(A)(b)(i) as the executor would no longer be armed with the power to sell the first property.

- C [55] The contention of the plaintiff that the defendant as executor needs the approval of all the beneficiaries before he can sell off the first property is not correct in law as it has never been the law that the sale of property belonging to the deceased cannot be transacted without the consent of the beneficiaries of the estate. This principle of law is stated in *Lau Yoke Hee & Anor v. Ting Liang Teng & Anor* [2005] 3 CLJ 770 at p. 775 by the Court of
- D Appeal as follows:

The third ground advanced before us is that the decree of specific performance is bad in law because the consent of the beneficiaries of the deceased's estate was not obtained before it was made. Learned counsel for the appellants relies on s. 60(2) of the Probate and Administration Act 1959 which reads as follows:

- E Unless the Court otherwise directs, no sale, transfer, conveyance or assent in respect of immovable property shall be made without the concurrence of all the personal representatives of the deceased; and subject as aforesaid, where there are several personal
- F representatives the power of all may, in the absence of any direction to the contrary in the will or grant of administration, be exercised by any one of them.

- G With respect, we are unable to agree with learned counsel's interpretation of this section. It is not, and it has never been the law that the sale of the property belonging to the deceased cannot be transacted without the consent of the beneficiaries of that estate. There are a number of authorities on that point but we only need to refer to two of them. The first is *Itam bte Saad v. Chik bte Abdullah* [1974] 2 MLJ 53.

[56] In *Tan Hock Khoon v. Phua Siew Leung & Ors* [2006] 4 CLJ 423; [2006] 6 AMR 33 at p. 38, the Court of Appeal repeated its own ruling:

- H Whilst the court may have regard to the interests of the beneficiaries there is no requirement in law that a sale of the property of the deceased's estate must have the consent of all or even a majority of the beneficiaries.

- I [57] In *Ong Ah Tang & Anor v. Soh Bee Yong* [2013] 1 CLJ 224; [2012] 2 MLRA 762, the Court of Appeal ruled that the High Court order that the lands (belonging to the estate of the deceased) to be sold to the respondent (one of the beneficiaries) was contrary to the relief (to be sold by public auction) sought by the appellants and against the wishes of the majority of the beneficiaries who supported the application that the lands be sold by

public auction. The Court of Appeal allowed the appellants' appeal, set aside the order of the High Court and substituted it with an order that the lands be sold by way of a public auction.

[58] Hence, based on the Probate and Administration Act 1959 and the case law, the defendant as the executor has the power to sell the first property without the consent of all the beneficiaries and what is required of the defendant is that the sale of the first property be for the benefit of the beneficiaries. In this case, the wishes of the majority of the beneficiaries were to sell the first property at the best price at the prevailing market of RM3,850,000 to Teow Eow Beng. The plaintiff was offered to purchase the first property at this price but he did not accept the offer. From the facts and circumstances, it is clear that the ulterior motive of the plaintiff to prevent the sale of the first property by the defendant is that the plaintiff and his children can continue doing their hardware business at the premise which has been rented out to their company CH Choon Heng Hardware Sdn Bhd on the excuse that it is the family business. The interference by the plaintiff is to deprive the other beneficiaries to the benefit of their inheritance that is their 1/7 shares each of the first property. This is exactly the situation in *Ong Ah Tang & Anor (supra)* case where the respondent (beneficiary) opposed the application for the order to sell by the administrator the lands of the estate on the ground that he had been in occupation of the lands for years and he wanted to buy the lands himself at his own offered price of RM480,000 instead of by public auction according to the wishes of the majority beneficiaries/appellants. The Court of Appeal disregarded the respondent's personal and sentimental reason for his purchase of the lands and ordered that the lands be sold at a public auction in order to fetch the best price for the benefit of all the beneficiaries.

[59] To stress the point that the personal interest or sentiments of an individual beneficiary is an immaterial consideration, I refer to *Halsbury's Law Of Malaysia*, vol. 11(2) 2011 *Reissue*, *Powers of Attorney, Wills, Probate, Administration and Succession* at p. 494, para. 330.540 as follows:

In considering an application by an administrator for the permission of the Court under s. 60(4) for the transfer by sale of immovable property vested in the administrator, the emotions and sentiments of the beneficiaries are not relevant.

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[60] The defendant as the executor (plaintiff here) had given the first option to purchase to all the beneficiaries including the plaintiff (defendant here) and since none of the beneficiaries wish to purchase the first property at RM3,850,000, the executor had fulfilled all the conditions imposed in the will, and in the result, the executor has the right to exercise his power under the will to sell the first property to Teoh Eow Beng at RM3,850,000.

A [61] The guiding principle for the court to follow in the exercise of its general equitable jurisdiction on the discretion of executors is succinctly stated in *Lee Ah Ngan & 1 lagi lwn. Lee Kow* [1995] 2 CLJ 51; [1994] MLRH 137 where the textbook *The Law of Succession Testate and Intestate*, 6th edn at p. 255 was quoted:

B The Court ought not, in the exercise of its general equitable jurisdiction to interfere with the discretion of trustees or personal representations in the absence of *mala fides* or some other special circumstances showing grave misdirection of themselves by the trustees or personal representatives.

C [62] As to the market price of the first property at RM3,850,000, it is the fair market price as at 23 July 2012 as appraised and valued by KT Appraisers. Up to current date, the plaintiff did not produce any valuation report to show that the market price should be higher than RM3,850,000 and as such the said price is the highest price available. Any lower price quoted by the plaintiff is unacceptable and not in the best interest of the estate. None of the other beneficiaries objected to the said market price of RM3,850,000.

D [63] In *Khoo Cheng Ors v. Gan Hong Yock & Ors And Another Appeal* [2005] 2 CLJ 85; [2005] 2 AMR 460 at p. 469, the Court of Appeal held that:

E Once the order for sale is made under s. 60(4) of the Probate and Administration Act, it is the duty of the administrators to sell the estate property at a price no lower than the reserved price. The administrators should act in the best interest of the estate and sell it at the highest price that is available.

F [64] In *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1983] 2 CLJ 252; [1983] CLJ (Rep) 433; [1983] 1 MLRA 226 the Federal Court held that:

In exercising its discretion the court will have to look into the facts and surrounding circumstances of the case, that is whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price.

G [65] Hence, in the light of the case law and principles stated above, I am inclined to grant the order for sale of the first property applied for by the defendant. The defendant had procured the best market price for the first property and there is no evidence of *mala fides* on his part as everything was conducted above board.

H **Conclusion**

I [66] For the O. 33 Rules of Court 2012 application, my answer to the first issue is in the negative and the answer to the second issue is in the positive. In the event, I dismissed the plaintiff's claim in 22NCVC-657-09-2012 with costs. For the Originating Summons No. 24-1683-10-2012, I allowed the claim with costs. However, I ordered only one set of costs of RM8,000 for both actions.
